# 92-1990

No. _____

Supreme Court, U.S.
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In The

## Supreme Court of the United States

October Term, 1992

REBA DOUGLAS, for herself and all others similarly situated,

*Petitioners,*

v.

C. PATRICK BABCOCK, Director of the Michigan Department of Social Services, and LOUIS SULLIVAN, Secretary of Health and Human Services,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Sixth Circuit erred in finding, contrary to the findings of the Second Circuit, that the Social Security Act requires the denial of prenatal care under 42 U.S.C. 1396a(a)(10)(A)(i)(III) or (IV) because of a previous determination that Petitioner was uncooperative in establishing paternity?

2. Whether the denial of prenatal care due to a previous determination that the mother was uncooperative in determining paternity violates the equal protection of the laws?

## LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Reba Douglas, on behalf of herself and all others similarly situated, and C. Patrick Babcock, Director of the Michigan Department of Social Services, and Louis Sullivan, Secretary of Health and Human Services. Respondent C. Patrick Babcock preceded Gerald Miller as Director of the Michigan Department of Social Services. Respondent Louis Sullivan preceded Defendant Donna Shalala as Secretary of the Department of Health and Human Services.

The State of Michigan, through the Michigan Department of Social Services, has taken the position throughout this case, that they desire to provide prenatal care, were the Federal Defendant to allow such an expenditure as a reimbursable expense under the State's federally approved Medicaid plan.

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**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

## PETITION FOR WRIT OF CERTIORARI

The petitioner, Reba Douglas, requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on March 25, 1993.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit will be reported at 990 F.2d 875 (6th Cir. 1993) but

has not yet been printed. Herein reported as 92-1231 (6th Cir.) as printed in Appendix A. The opinion of the District Court has not as yet, been reported. It is reprinted in Appendix B.

## JURISDICTION

The petitioners brought this suit pursuant to 28 U.S.C. 1331 and 1343 in the Eastern District of Michigan. On April 10, 1990, the District Court for the Eastern District of Michigan issued a preliminary injunction accompanied by a Memorandum Opinion and Order. The federal defendant filed a timely appeal.

Defendant appealed to the Sixth Circuit Court of Appeals pursuant to 28 U.S.C. 1291. After briefing but before argument, Congress amended 42 U.S.C. 1396k(a)(1)(B). After argument, the Sixth Circuit remanded the case for consideration of the amendment. On November 26, 1991, the District Court heard arguments on cross motions for summary judgment. A judgment was rendered by the Court on December 23, 1991, denying all Plaintiff's claims for relief. Plaintiff filed a timely appeal to the Sixth Circuit Court of Appeals.

On March 25, 1993, the Court entered a judgment affirming the District Court's grant of summary judgment for defendant. This petition was filed within 90 days of that order.

The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked pursuant to 28 U.S.C. 1254(1).

## CONSTITUTIONAL PROVISION, AND STATUTES INVOLVED

**U.S. Const. Amend. V**

[No] person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**42 U.S.C. 1396a(a)(10)(A)(i) I-IV**

A State plan for medical assistance must-

(10) provide-

(A) for making medical assistance available, including at least the care and services listed in paragraphs (1) through (5), (17) and (21) of section 1396d(a) of this title, to-

(i) all individuals-

(I) who are receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV, or XVI of this chapter (including individuals eligible under this subchapter by reason of section 602(a)(37), 606(h), or 673(b) of this title, or considered by the State to be receiving such aid as authorized under section 682(e)(6) of this title),

(II) with respect to whom supplemental security income benefits are being paid under subchapter XVI of this chapter or who are qualified severely impaired individuals (as defined in section 1396d(q) of this title),

(III) who are qualified pregnant women or children as defined in section 1396d(n) of this title,

(IV) who are described in subparagraph (A) or (B) of subsection (l)(1) of this section and whose family income does not exceed the minimum income level the State is required to establish under subsection (l)(2)(A) of this section for such a family;

**42 U.S.C.1396a(l)(1)(A)**

(1) Individuals described in this paragraph are-

(A) women during pregnancy (and during the 60-day period beginning on the last day of the pregnancy),

(B) . . .

(C) . . .

(D) . . .

who are not described in any subclauses (I) through (III) of subsection (a)(10)(A)(i) of this section and whose family income does not exceed the income level established by the State under paragraph (2) for a family size equal to the size of the family, including the woman, infant, or child.

**42 U.S.C. 1396d(n)(1)(C)**

The term "qualified pregnant woman or child" means a (1) a pregnant woman who

(A) . . .

(B) . . .

(C) otherwise meets the income and resources requirements of a State plan under part A of subchapter IV of this chapter; and . . .

**42 U.S.C. 1396k**

(a) . . . a State plan for medical assistance shall

(1) provide that, as a condition of eligibility for medical assistance under the State plan to an individual who has the legal capacity to execute an assignment for himself, the individual is required-

(A) . . .

(B) to cooperate with the State (i) in establishing the paternity of such person . . . if the person is a child born out of wedlock, and (ii) in obtaining support and payments . . . unless (in either case) the individual is described in section 1396a(l)(1)(A) of this title . . .

## STATEMENT OF THE CASE

### A. Introduction

This case involves a simple question. Should the poorest women in America be punished for prior alleged

wrong doing (non-cooperation in establishing the paternity of their children) by the withholding of Medicaid coverage for prenatal care, or should prenatal care be granted as Congress intended?

**B. The Structure of the Program**

The Medicaid program was established in 1965. It is a joint federal/state program to "provide federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons." *Harris v. McRae*, 448 U.S. 297, 301, 65 L. Ed. 2d 784, 100 S. Ct. 2671 (1980). States that choose to participate in the program are subject to the terms of the program and the regulations promulgated thereunder. 42 U.S.C. 1396a.

Title XIX of the Social Security Act, which created the Medicaid program (hereinafter "Act") establishes three categories of coverage for individuals, the mandatory categorically needy, the optionally categorically needy (not relevant to this case) and the medically needy. The mandatory categorically needy are automatically eligible for Medicaid by virtue of their status as recipients of another benefit, i.e. Aid to Families with Dependent Children (AFDC)[1], Supplemental Security Income (SSI)[2], or

---

[1] AFDC is available only to low income parents with dependent children who are deprived because one of the parents is dead, absent, (or at state option) unemployed or incapacitated.

[2] SSI is available to low income persons who are aged, blind or disabled.

through their status as qualified pregnant women. Mandatory categorically needy persons are all automatically eligible for Medicaid by virtue of their status.

The medically needy include those persons whose income makes them ineligible for a categorically needy program, but whose medical expenses are high enough that they are eligible if those expenses are subtracted from their income.

Pregnant women can currently be covered under any of these categories. This was not always true. The coverage of pregnant women has evolved as Congress has gradually expanded the coverage.

### C. History of Prenatal Care Provisions

Prior to 1975, Medicaid coverage for prenatal care was not available as part of AFDC eligibility. This Court, in *Burns v. Alcala*, 420 U.S. 575, 584, 43 L. Ed. 2d 469, 95 S. Ct. 1180 (1975) held that a fetus was not a "dependent child" who was eligible for AFDC-related Medicaid. The Court suggested that the Secretary could authorize such coverage under its general regulatory power. Between 1975 and 1981, the Secretary allowed the states to provide Medicaid coverage as an option to single pregnant women without children.

In 1981, Congress began a pilgrimage towards the ultimate goal of providing prenatal care to all poor women. As part of the Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, 95 Stat. 853 (1981) (OBRA 81), Congress allowed states to "deem" pregnant women to be AFDC recipients for purposes of Medicaid coverage. In

addition, if states provided medically needy coverage to anyone, they were required to include pregnant women in that coverage. This was accomplished by allowing a fetus to be counted as a person in determining the number of persons in a grant. A single pregnant woman without children, in her third trimester would be counted as two persons, and if financially eligible as a family of two, would receive AFDC benefits.

In 1984 as part of the Deficit Reduction Act, Pub. L. 98-369, 98 Stat. 494 (1984) (DEFRA 84), Congress made coverage of pregnant women mandatory. That is, pregnant women became a type of mandatory categorically eligible recipient, by virtue of their status as pregnant women. DEFRA 84 also made coverage of the newborn child under Medicaid mandatory by adding a new category to the listed mandatory categorically eligible groups listed in 1396a(a)(10)(A)(i). Under DEFRA, however, this mandatory coverage only applied to persons who met all the AFDC eligibility requirements. If, for example, a family was intact with both parents present and no other deprivation of a parent, they would not be eligible for Medicaid coverage for prenatal care.

In the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. 99-272, 100 Stat. 201 (COBRA 85) this impediment was removed. COBRA 85 provided that persons who were financially eligible for AFDC must be covered for prenatal care, despite the fact that they may not meet the other conditions of AFDC eligibility. In other words, if a poor woman was pregnant, and she met the AFDC income and asset requirements, she was eligible for prenatal care.

Again in 1988, Congress once again expanded the coverage for pregnant women through the passage of the Medicare Catastrophic Coverage Act (MCCA), Pub. L. 100-360, 102 Stat. 751 (1988). The MCCA created a new category of mandatory categorically eligible persons: pregnant women under the poverty line. Unlike the case previously, there was not only no link to AFDC at all, but there was also no asset limit. Instead, any pregnant woman with income below 185% of poverty was eligible for prenatal care, regardless of her assets.

Finally, in 1990, Congress amended 42 U.S.C. 1396k so as to exempt all pregnant women from the cooperation requirement. This standard requires that a woman cooperate in establishing the paternity of a child so that the State can pursue child support and the cost of confinement. (Costs of confinement are the costs incurred in delivery and post partum care.) As long as current income was below 185% of the poverty line, a woman was eligible for prenatal care. She could have limitless assets. She was specifically exempt from any cooperation requirement.

## D. Framework of Prenatal Care Provisions

As a result of the series of amendments to the Medicaid statute, there are now 4 general groups of pregnant women who are categorically eligible for Medicaid. These groups are summarized below and in Appendix C.

1. **Group I: AFDC Recipients**

   42 U.S.C. 1396a(a)(10)(A)(i)(I),

   All AFDC recipients automatically receive Medicaid.

2. **Group II: SSI Recipients**

   42 U.S.C. 1396a(a)(10)(A)(i)(II)

   All Supplemental Security Income recipients are also categorically eligible for Medicaid.

3. **Group III: Qualified Pregnant Women**

   42 U.S.C. 1396a(a)(10)(A)(i)(III)

   Group III consists of certain pregnant women who are categorically eligible to receive MA, even if they do not receive AFDC or SSI. Eligibility for Group III MA is based on a separate definition of pregnant women contained at 42 U.S.C. 1396d(n) who are made categorically eligible at 42 U.S.C. 1396a(a)(10)(A)(i)(III). All women within the definition of 1396d(n) automatically receive MA during the period of prenatal, delivery and postpartum care.

42 U.S.C. 1396d(n) defines three groups of pregnant women. (See Attachment II). These women include 3 groups:

A. pregnant women who would be eligible if their unborn child was counted as a member of the AFDC group

or

B. pregnant women who would be eligible for AFDC for the unemployed, even if the state

has not opted to provide coverage for the unemployed

or

C. pregnant women who otherwise meet the income and resource requirement of AFDC.

**4. Group IV: Other Low-Income Pregnant Women**

42 U.S.C. 1396a(a)(10)(A)(i)(IV)

When Congress created the last group of pregnant women who are categorically eligible for Medicaid in MCCA, it used a sweeping definition that encompassed all pregnant women who were not otherwise covered by Groups I through Group III, and whose income is below 185% of the poverty guideline. There is not even any limit on the amount of resources that these women have at their disposal. 42 U.S.C. 1396a(a)(10)(i)(IV) grants Medicaid categorically to pregnant women described at 42 U.S.C. 1396a(l)(1)(A). That section, in turn states that categorical eligibility is available for pregnant women under Group IV only if they "are not described in any of the subclauses (I) through (III) of subsection (a)(10)(A)(i)."

In Group IV, Congress created a "catch-all" provision that would ensure that any poor pregnant women who were not covered by any other Medicaid program would receive prenatal, delivery, and postpartum care. All pregnant women under 185% of poverty are within Group IV.

The 1990 amendments to the Medicaid statute provide further evidence of Congress' intent to ensure Medicaid eligibility to all poor pregnant women, who might otherwise be ineligible. As part of the Omnibus Budget Reconciliation Act of 1990, Pub. L. 101-508, Sec. 4606, Congress specifically exempted all Group IV women from any requirement that they must cooperate in the establishing of paternity in order to qualify for care.

## II. PETITIONER'S FACTS

Reba Douglas became pregnant in 1978. In 1979, she gave birth to a son, Ezikio. In 1985, Ms. Douglas was asked by the Michigan Department of Social Services (MDSS) to cooperate by identifying the father of Ezikio pursuant to 42 U.S.C. 606. She was unable to provide enough information to the Department regarding a brief liaison of six years earlier, to allow MDSS to find the father of Ezikio. MDSS determined after a hearing that Ms. Douglas had not sufficiently cooperated. She twice identified the father as a Leon Monroe, and on one application, spelled the name as what appeared to be "Monourn." She stated at one interview that she had sex with Mr. Monroe at a house on Beach Street. At a subsequent interview, she stated that she had sex twice with Mr. Monroe, once at a house on Beach and once on Ruth Street. Ms. Douglas went back to look for Mr. Monroe, and was unable to locate him. She was told he was somewhere in Memphis. Ms. Douglas reported this information to MDSS.

During the period that Ms. Douglas had her liaison with Mr. Monroe, she was under the treatment of Dr.

Ailes for psychiatric problems, related to drug and alcohol abuse. Based on the apparent conflicts in Ms. Douglas' information, the Department determined that Ms. Douglas had not sufficiently cooperated in establishing paternity. Ms. Douglas has not received AFDC for herself since 1985. As a result, she was not eligible under Group I as an AFDC recipient and has not received Medicaid since that time.

In 1990, Ms. Douglas became pregnant. At the Department's request, she identified the father of the child in utero (the father has since acknowledged paternity) and requested assistance with prenatal care. She was denied because the Department of Social Services had determined that she had not cooperated in identifying Mr. Monroe, with whom she had a brief liaison eleven years earlier. Consequently, she was denied prenatal care for her unborn child under Group III or Group IV, although she was a poor, pregnant woman.

## REASONS FOR GRANTING THE WRIT

### I. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT CONFLICTS WITH THE FINDINGS OF THE SECOND CIRCUIT, BY DENYING PRENATAL CARE UNDER 42 U.S.C. 1396A(A)(10)(A)(I)(III) AND (IV) BECAUSE OF A PREVIOUS DETERMINATION THAT PETITIONER WAS UNCOOPERATIVE IN ESTABLISHING PATERNITY?

#### A. There is a conflict in the Circuits.

The Second Circuit, in the case of *Lewis v. Grinker*, 965 F.2d 1206 (1992) determined that the provisions of the

Medicaid statute concerning prenatal care were ambiguous as interpreted, and determined that reference to legislative history was required in order to determine the intent of Congress. *Lewis* then found that the prenatal care provisions of the Medicaid statute were intended to cover all pregnant poor women, regardless of other qualifications or eligibility.

The Sixth Circuit below, disagreed. "We decline to follow the approach of *Lewis*." *Douglas v. Babcock*, 92-1231 (6th Cir.) at 12.

The dissent below expressly indicates the conflict:

> "[T]his approach, as the Court concedes, leads to a conflict with the Second Circuit in *Lewis v. Grinker*, 965 F.2d 1206, 1215-20 (2nd Cir. 1992), which addressed the convoluted provisions on prenatal care, and held that examination of legislative evidence of intent is more important than the often incomprehensible language of the sub-sections and cross-references of the statute itself." *Id.* at 16.

**B. Categorically eligible persons are eligible for prenatal care, regardless of other eligibility requirements.**

In *Lewis v. Grinker*, 965 F.2d 1206 (2nd Cir. 1992) the United States Court of Appeals for the Second Circuit determined that when Congress passed COBRA 85, they established a new mandatory categorically eligible group, i.e. pregnant women who met AFDC income and asset limits.

When a person is mandatorily categorically eligible for Medicaid, that person receives Medicaid benefits regardless of requirements that might apply to other recipients. For example, all AFDC recipients automatically receive Medicaid. Similarly, all SSI recipients receive Medicaid. There is no such thing as an AFDC or SSI recipient who does not receive Medicaid. *Social Security Handbook* at Sec. 2309. This eligibility by virtue of one's membership in a category is separate from other kinds of Medicaid eligibility. Other requirements of Medicaid eligibility do not apply.

For example, if persons meet the eligibility requirement of a categorically designated group, they need not meet any of the requirements of regular Medicaid, including filing the application form that is otherwise required by 42 U.S.C. 1396a(a)(8). This is vividly demonstrated in the case of SSI recipients. All SSI recipients receive Medicaid, but they are not required to fill out Medicaid applications. See *Crippen v. Kheder*, 741 F.2d 102 (6th Cir. 1984).

In *Lewis*, the Second Circuit recognized the distinction between mandatory categorically eligible and other Medicaid recipients. The mandatory categorically eligible pregnant women described in 42 U.S.C. 1396a(a)(10)(A)(i)(III) need only meet the conditions of that category. They need not meet alienage or cooperation requirements that are not part of the category. In fact, the comments to the regulations support the premise that categorically eligible persons need only meet the requirements of that category. As was stated in *Lewis, supra,*

> The Secretary has construed subsection (C) to mean that "[i]n determining whether a woman would be eligible under the provisions of [1396](n)(1)(C) of the Act, State Medicaid agencies must apply **only** the financial eligibility criteria of the State's approved AFDC plan" 52 Fed. Reg. 43,065 (1987) (emphasis added in *Lewis*.)
>
> *Lewis supra* at 1217

With this analysis, the *Lewis* Court held that the regular Medicaid requirement of citizenship or status as "permanently residing under the color of law" (PURCOL) need not be satisfied for Medicaid eligibility in Group III. *Lewis* held that by establishing eligibility for pregnant women in Group III Congress intended to eliminate all eligibility criteria other then income and pregnancy. Under *Lewis'* reading of the Act, Ms. Douglas should be eligible as a Group III member.

Although the Second Circuit has held that Group III pregnant women are a mandatory categorically eligible group, the Court below failed to do so.

The *Lewis* Court determined that persons who are categorically eligible need only meet the requirements set forth in their category and not other Medicaid eligibility conditions. The Sixth Circuit, by contrast, holds categorically eligible persons to the additional eligibility conditions of other Medicaid recipients.

There is a specific example that illustrates that *Lewis* is correct, and that the Sixth Circuit erred in requiring categorically eligible persons to meet additional eligibility criteria. There are two main groups of mandatory categorically eligible persons, AFDC and SSI recipients. If

*Lewis* is correct, then SSI or AFDC recipients would not be required to cooperate in establishing paternity unless otherwise required by their category. AFDC recipients are required by an AFDC statute to cooperate in establishing paternity. See 42 U.S.C. 606. There is, however, no separate cooperation requirement for SSI recipients within the SSI statute. If *Lewis* is correct, and additional eligibility criteria are not required of the mandatory categorically eligible persons, than there is no cooperation requirement of SSI recipients. In fact, this is precisely the case. SSI recipients are not required to cooperate in establishing paternity, and in fact, are not even asked to cooperate. The Court below refused to address this fact, preferring to ignore the policy implications. Had they done so, they would have found Ms. Douglas eligible for Group III prenatal care.

### C. Subsequent Clarification by Congress Makes it Clear That the Cooperation Requirement Does Not Apply to Pregnant Women.

In November of 1990, Congress amended 42 U.S.C. 1396k to make it clear that the cooperation requirement was not a condition of eligibility for pregnant women. 1396k states in relevant part, as follows

(a) [the state plan for medical assistance must] (1) provide that, . . . the individual is required –

> (B) to cooperate with the State (i) in establishing paternity . . . unless (in either case) the individual is described in section 1396a(l)(1)(A) . . .

1396a(l)(1)(A) states:

> (A) women during pregnancy (and during the 60-day period beginning on the last day of pregnancy),

On its face, the amendment to 1396k would seem to resolve any remaining issue in this case. However, the Sixth Circuit looked to language subsequent to 1396a(l)(1)(A), a dangling phrase which purports to further define Group IV pregnant women as those

> "who are not described in any of the subclauses (I) through (III) of subsection (a)(10)(A)(i) . . . "

Groups I-III describe categorically eligible groups. Group I describes AFDC recipients, Group II describes SSI recipients, and III refers to qualified pregnant women as defined in 1396d(n). Section 1396d(n) refers to women who are pregnant and otherwise meet the income and resource limits of AFDC recipients. Under the holding of the Sixth Circuit, Ms. Douglas meets the income and resource guidelines of AFDC, and therefore is described in Group III defined as a "qualified pregnant woman". (One wonders if she is not really an UNqualified pregnant woman.) Because they view her as in Group III they reason that she is not described in Group IV, as it applies only to those not described in Groups I-III.

While the Court below went beyond the narrow confines of 1396a(l)(1)(A) to the subsequent phrase, they refused to consider the preceding language to 42 U.S.C. 1396a(a)(10)(A) which states that the state plan "shall provide . . . for making medical assistance available" to Groups I-III. This definition, therefore includes only those persons who are actually receiving assistance. Since Ms.

Douglas is not receiving medical assistance, she cannot be within the purview of Group III. Under this reading, she is not among those described in Groups I-III. For reasons that are not explained, the court below included subsequent modifying phrases when it interpreted 1396k, but refused to consider preceding phrases in 1396a(a)(10)(A) that are equally important. If the modifying phrase is read so that Ms. Douglas is not within those persons receiving prenatal care under Group III, then Ms. Douglas must be eligible as a Group IV person.

### D. Rules of Statutory Construction Must be Applied Consistently.

As was explained above, the Sixth Circuit was confronted with two phrases, one dangling in 42 U.S.C. 1396d(n), and one precedent, in 42 U.S.C. 1396a(a)(10)(A) which modify specific subsections referenced in the Act. In order to disqualify Ms. Douglas because she is "described" in Group III, they must consider the dangling phrase modifying subsection 1396a(l)(1)(A). This would seem to present a rule of statutory construction which requires modifying phrases outside a specifically cross-referenced subsection to be considered. However, if that is the rule, then the preceding phrase to 42 U.S.C. 1396a(a)(10)(A)(i) must be considered, which states that those in Groups I-III receive Medicaid benefits. If the statutory rule is that modifying phrases are to be included, then Ms. Douglas is eligible as a Group IV person, not described in Group III, as she does not receive Medicaid prenatal care.

If, on the other hand, the rule is that modifying phrases outside a specific subphrase referenced are not to be read into a cross-reference, then the "described in" language of 42 U.S.C. 1396a(l)(1)(A) should not be included, and Ms. Douglas is clearly eligible under both Group III and IV.

Any consistent rule of statutory construction, applied throughout the analysis, will result in prenatal care for all poor pregnant women, without regard to additional eligibility requirements.

This Court has never (according to Petitioner's research) addressed the specific statutory rules in question, in order to clarify the issue.

### E. The Legislative History Makes it Clear That All Poor Pregnant Women are to Receive Prenatal Care Under Medicaid.

The Sixth Circuit did not find the above statutory morass ambiguous, despite finding that "a determination of eligibility requires an eye-glazing examination of a labyrinthine maze of sections, and seemingly infinite subsections . . . " *Douglas, supra at 7. As a result, it refused to consider the legislative history of any of the prenatal care provisions. Would the Court have done so, it would have found the result to be clear and compelling as did the Lewis* court.

This Court has acknowledged the Act as one of the "most intricate ever drafted by Congress" and "almost unintelligible to the uninitiated . . . " *Schweiker v. Gray Panthers*, 453 U.S. 34, 43, 69 L. Ed. 2d 460, 101 S. Ct. 2633

(1981). Chief Justice Burger noted that "the Medicaid program is a morass of bureaucratic complexity . . . " *Herweg v. Ray*, 455 U.S. 265, 279, 71 L. Ed. 2d 137, 102 S. Ct. 1059 (1982)[3]

As Chief Judge Merritt stated below in his dissent, "[A]n analysis of the statute is almost impossible, for the convoluted statutory language is a puzzling jumble of words, exceptions, exceptions to exceptions, and exceptions to exceptions to exceptions . . . " "[T]he statute is at best opaque, and at worst incomprehensible." *Douglas, supra* at 15.

Given the ambiguous nature of the statute, it is incumbent on any Court to look at the legislative history of the Act to determine the legislative intent.

Congress' belief in the need for prenatal care for all poor women is evident from a review of the committee

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[3] Other Courts have been even more critical, going so far as to call the construction of the Act "byzantine". *Athens Community Hosp. v. Heckler*, 565 F. Supp. 695 (E.D. Tenn. 1983).

"The Medicaid statute . . . is an aggravated assault on the English language, resistant to attempts to understand it. The statute is complicated and murky, not only difficult to administer and to interpret but a poor example to those who would like to use plain and simple expressions." *Rousseau v. Bordeleau*, 624 F. Supp. 355, 358 (D.C. R.I. 1985).

In *Friedman v. Berger*, 547 F.2d 724, 727 (2nd Cir. 1976) the Court chides that "Explanation (of the Act) requires a foray into statutory provisions and . . . regulations of labyrinthine complexity." The *Friedman* Court goes further with the comments, "A draftsman who has gotten himself into a position requiring anything like this should make a fresh start. Such unintelligibility is doubly unfortunate in the case of a statute dealing with the rights of poor people." *Id.* at 727.

reports issued in support of the amendments enacted in DEFRA and COBRA. In support of the expansion, Congress noted the connection between access to medical care, especially prenatal care, as a factor in decreasing the incidence of infant mortality and morbidity in this country. In recommending passage of the Medicare and Medicaid Budget Reconciliation Amendments of 1984, Pub. L. 98-369, 98 Stat. 1061 (1984) the House Committee on Energy and Commerce in its report stated:

> "As a result of these various (sic) State Medicaid eligibility policies, many desperately poor low-income women and children have no health care coverage. The lack of coverage, in turn, makes it extremely difficult for these women to receive adequate prenatal care, since many hospitals and physicians will simply not treat patients who have no source of payment . . .
>
> Over the last several years, the Committee has heard extensive testimony on the health of both the newborn and the mother. The Committee record is also replete with documentation of the importance of adequate medical attention for infants and young children in preventing unnecessary mental and physical development problems. Testimony received by the Select Committee on Children, Youth, and Families buttresses this record. In the view of the Committee, an investment in adequate health care for low-income pregnant women and young children is among the most intelligent expenditures of funds that the federal government could conceivably make.
>
> Medicaid Maternal and Child Health Initiatives, 1983: Hearings on H.R. 1106, H.R. 3590 Before the Subcomm. on Health and the Environment

on Energy and Commerce Committee, 98th Cong., 1st Sess. (1983).

Similarly, in 1986, when Congress again expanded Medicaid coverage for low-income pregnant women and children, the Committee on Energy and Commerce in recommending passage of the Medicare and Medicaid Budget Reconciliation Amendments of 1985, Pub. L. 99-272, 100 Stat. 151 (1985), noted that the testimony heard by the House Subcommittee on Health and Environment "makes abundantly clear that, in order to reduce the high rates of infant mortality and morbidity in the United States, this country must improve access to prenatal care by poor pregnant women." H.R. Rep. No. 3101, 99th Cong., 1st Sess., Sec. 201 at 56 (1985). The Committee found particularly compelling the conclusions of a study conducted by the Committee to Study the Prevention of Low Birthweight, of the Institute of Medicine of the National Academy of Sciences which found that prenatal care is an essential element in any strategy for reducing the incidence of low birthweight births.

Regarding the cost effectiveness of prenatal care, the Committee quoted the study, stating, "§ [t]he IOM Committee estimated that each dollar spent on prenatal care for high-risk women (including the poor) could save as much as $3.38 on specialized care for low birthweight infants." *Id.*

The passage of expanded prenatal care was viewed as a cost savings measure, enacted as part of the goal of meeting the Gramm-Rudman target. Adequate prenatal care was intended to reduce later postpartum costs of low birthweight children. The cost savings of $3.38 per dollar

spent, referred to by the committee, included only the costs of prenatal care, defined as prebirth and 60 days after delivery, and did not include future cost savings. Given that these children are born into poor families, it is probable that any retarded, blind or otherwise disabled children would become SSI and Medicaid recipients for life. The cost savings of this lifelong care were not factored into the cost savings referred to by the committee. The true cost savings are enormous.

The legislative intent of the 1990 amendment was best summarized by Judge Merritt in the dissent below.

> "The legislative history of the 1990 amendment clearly states that the statute changes the law in order to allow pregnant women in poverty to be eligible for prenatal medical care even though they cannot (as in this case) or will not identify the father. The House Report says that "under current law, States must require all applicants for Medicaid, as a condition of eligibility, to cooperate with the State in establishing paternity and in obtaining child support." The Report then says that the legislation changes this rule for pregnant women because "the Committee is concerned that application of these requirements may discourage many of them from seeking benefits that would give them access to early prenatal care."
>
> The report then makes it abundantly clear that it is changing the old rule which denies eligibility for non-cooperating pregnant women:
>
> The Committee bill, therefore, exempts pregnant women applying for Medicaid on the basis of

> their pregnancy and low income from the cooperation requirements with respect to establishing paternity and obtaining child support.
>
> Pub. L. 101-508, Stat. 1388; H.R. Rep. No. 101-881, 101 Cong., 1st Sess. at 2119 (1991). Quoted in *Douglas* at 15-16.

It is impossible to read the legislative history and not conclude that the intent of Congress was to exempt all poor women from the cooperation requirement so there would be universal prenatal care for poor pregnant women.

### F. The Secretary's Interpretation Is Not Entitled to Deference.

The court below based its holding in part on the determination that the Secretary should be given deference. This determination is questionable at best. The only evidence submitted in the district court of the Secretary's non-litigation position was a memo from the Secretary to the House Subcommittee on Health and Human Services where the Secretary urges that the phrase "described in" be deleted so that a single simplified application could be used to provide all poor women with prenatal and postpartum care "**as Congress intended.**" See Appendix D.

The Secretary's position as explained in this memo is in fact logical and consistent. Under the holding of the Sixth Circuit below, all applicants for Medicaid under Group IV would first have to fill out an application for Group III benefits, in order to see if they were "described" as AFDC related, but for other reasons found to be ineligible. They would have to complete the entire

AFDC application. (In Michigan, this is a 29 page booklet.) Once this application had been completed, they could then apply for Group IV benefits with a simplified application in the event that they didn't qualify as a member of Group III. This interpretation frustrates the Congressional intent of making the application process simpler for poor pregnant women and removing the deterent of identifying the father. It also frustrates the intent to grant benefits to all those not covered by Groups I-III. The application process required under the Sixth Circuit's analysis is administratively cumbersome, to the point of being silly.

This is not a case where deference is to be given. The Secretary admits that Congress intended for all poor women to be eligible for prenatal care. The court below ignored this fact.

## II. DEFENDANTS VIOLATED PLAINTIFFS' RIGHTS TO EQUAL PROTECTION UNDER THE LAWS BY GRANTING MEDICAID TO PREGNANT WOMEN WHO DO NOT COOPERATE IN DETERMINING THE PATERNITY OF PREVIOUS CHILDREN REGARDLESS OF THEIR LEVEL OF ASSETS, BUT DENYING IT TO SIMILARLY UNCOOPERATIVE WOMEN WHO HAVE NOT COOPERATED FOR PURPOSES OF AFDC.

The Equal Protection guarantee implicit in the Fifth Amendment protects classes of persons against invidious discrimination. Here, the Secretary would create a separate classification of poor pregnant women who would be denied prenatal care. In order to survive judicial scrutiny,

the classification must be "rationally related to a legitimate government interest." See *Harris v. McRae*, 448 U.S. 297, 324, 65 L. Ed. 2d 784, 100 S. Ct. 2671 (1980).

While in most cases this is an easy test for the government to meet, in this case it cannot meet the test.

The Secretary's position would take the poorest classification of women (those eligible financially to receive AFDC, but not receiving the benefits) and would deny them prenatal care. This is not done to save money, as Congress has already determined that each dollar of prenatal care expended saves $3.34 in health care costs for low birthweight babies. Since these babies would be born to impoverished women, each child born with mental retardation, cerebral palsy or other such ailment, would likely become a dependent on the state for life. The cost of this continual care has not been estimated but is clearly enormous. Saving public funds is obviously not the governmental interest involved.

The government could assert that it was trying to recoup the cost of confinement, but as pointed out earlier, the father of Petitioner's previous child would not be liable for the cost of confinement for this child in any event.

It could be asserted that the government has an interest in collecting such birth-related costs on behalf of all persons for whom Medicaid is granted. However, under Group IV, pregnant women with unlimited resources (they could have $1,000,000 in assets) and far greater income are not required to cooperate. Therefore, the statute shows that the reimbursement of costs is not really the government's intent. There is no rational reason to try

and collect those costs only from the sexual partners of the very poorest of women.

In this case the government can claim no legitimate reason for attempting to coerce pregnant women into cooperating by threatening to increase the likelihood of mental retardation, cerebral palsy and similar disabilities in their unborn children. Such coercion may be considered legitimate in other societies and governments, but not in this country.

## CONCLUSION

This case presents a clear conflict between the circuits. The decision below conflicts directly with the Second Circuit decision in *Lewis*. While *Lewis* found that the Medicaid Act was confusing and required consideration of congressional intent, the Sixth Circuit did not. Where *Lewis* found the prenatal care provisions to be ambiguous, the Sixth Cicuit did not. The *Lewis* court determined that categorically eligible persons were exempt from other Mediciad requirements, the Sixth Circuit did not so find.

In addition, this case presents a previously undecided question of statutory construction. Should phrases outside a specifically cross-referenced phrase be read into a statute, or should it be read on its own? Does this rule change based on whether or not the phrase is precedent or subsequent?

Finally, is there any rational basis for denying the poorest of women prenatal care, while granting the same care to women who may have millions of dollars in

assets, when the government acknowledges that granting care will save countless millions of dollars?

Petitioners respectfully request that this Court grant a writ of Certiorari, and schedule this case for argument. In the alternative, Petitioners request a summary reversal of the decision of the Sixth Circuit.

Respectfully submitted,

Dated: June 15, 1993

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**APPENDIX A**

No. 92-1231

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

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| | | |
|---|---|---|
| REBA DOUGLAS, for herself and all others similarly situated, *Plaintiff-Appellant*, | ) | ON APPEAL from the United States District Court for the Eastern District of Michigan |
| v. | ) | |
| C. PATRICK BABCOCK, Director of the Michigan Department of Social Services, and LOUIS SULLIVAN, Secretary of Health and Human Services, *Defendants-Appellees*. | ) | |

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Decided and Filed March 25, 1993

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Before: MERRITT, Chief Judge; and GUY and RYAN, Circuit Judges.

RYAN, Circuit Judge, delivered the opinion of the court, in which GUY, Circuit Judge, joined. MERRITT, Chief Judge (pp. 15-19), delivered a separate dissenting opinion.

RYAN, Circuit Judge. Reba Douglas seeks pregnancy-related Medicaid benefits. She appeals from a grant of

summary judgment in favor of the Director of the Michigan Department of Social Services (MDSS) and the Secretary of Health and Human Services (HHS). Douglas presents the following issues on appeal:

> 1. Whether the district court erred in finding Douglas ineligible for pregnancy-related benefits under 42 U.S.C. § 1396(a)(10)(A)(i)(III) or (IV), in light of a previous determination that she was uncooperative in establishing the paternity of her oldest child; and
>
> 2. Whether the denial of benefits violated Douglas's right to equal protection under the law.

We find the district court correctly determined these issues and we shall affirm.

## I.

Reba Douglas, who was pregnant and had two minor children, applied for Medicaid prenatal and postpartum medical benefits in 1989. MDSS denied Douglas's application because the state Aid to Families with Dependent Children (AFDC) agency found she had failed to cooperate, without good cause, in establishing the paternity of her oldest child, Ezekio, who was born in 1979, and assigning rights for his support. This finding of noncooperation was made pursuant to 42 U.S.C. § 602(a)(26) and 45 C.F.R. § 232.12(a), as administered under the Michigan statutory scheme.

Douglas filed suit in the United States District Court for the Eastern District of Michigan, contesting the denial of prenatal care for herself and all others similarly situated. After the district court denied class certification,

Douglas proceeded individually, contending that the AFDC cooperation and assignment provisions with respect to Ezekio did not apply to eligibility for Medicaid prenatal benefits for her current pregnancy, and that HHS's interpretation of the statute violated her right to equal protection under the law. She sought injunctive relief.

The district court granted a preliminary injunction barring MDSS and HHS from "interpreting the assignment and cooperation requirements of the Medicaid statute to bar prenatal . . . care of pregnant women who have complied with the requirements with respect to the child *in utero*."

HHS appealed issuance of the injunction to this court.[1] While the appeal was pending, Congress amended 42 U.S.C. § 1396k to exempt a specific group of pregnant women, described in 42 U.S.C. § 1396a(l)(1)(A), from its cooperation requirements. Following oral argument, this court remanded the case to the district court for consideration of the effect of the 1990 amendment.[2]

On remand, the district court found that Douglas was not covered by the 1990 amendment. The court granted summary judgment for MDSS and HHS, concluding that "following the plain language of the statute," Douglas was not eligible for Medicaid prenatal care, because she

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[1] The state of Michigan did not participate in that appeal and is not participating in the current appeal. Michigan has taken the position that it would pay the benefits in question if HHS's position did not deny the state federal reimbursement.

[2] *Douglas v. Babcock*, No. 90-1709 (6th Cir. Apr. 19, 1991) (order).

had failed to cooperate. The district court denied Douglas's equal protection claim, finding that the challenged statute was rationally related to a legitimate government interest. Douglas perfected a timely appeal to this court.

II.

This court reviews a grant of summary judgment *de novo*. *Brooks v. American Broadcasting Cos.*, 932 F.2d 495, 500 (6th Cir. 1991). This appeal raises a question of statutory construction, a legal question we review *de novo*. *Cf. Smith v. Commissioner*, 937 F.2d 1089, 1096 (6th Cir. 1991).

III.

Douglas argues that the district court erred in denying her the requested prenatal care benefits because she is "categorically eligible" for Medicaid benefits as a low-income woman under 42 U.S.C. § 1396d(n)(1)(C) pursuant to 42 U.S.C. § 1396a(a)(10)(A)(i)(III) or (IV). Douglas contends that since she meets the income and resource requirements referenced in section 1396d(n)(1)(C), she is eligible for Medicaid prenatal care under section 1396a(a)(10)(A)(i)(*III*). Douglas next argues that even if she is ineligible under section 1396a(a)(10)(A)(i)(*III*), she is alternatively eligible under section 1396a(a)(10)(A)(i)(*IV*).

As a final alternative argument, Douglas contends that even if she is determined to be ineligible for Medicaid prenatal benefits under a literal reading of the applicable statutes, she should nevertheless receive the

benefits because such a reading would frustrate Congress's intent to provide comprehensive prenatal Medicaid benefits for low income women. She urges us not to read the statutes "too rigidly" in order to promote what she deems as the more fundamental congressional goal of promoting prenatal care for low-income women.

The Secretary contends that under the provisions of section 1396k, Douglas's previous paternity noncooperation makes her ineligible for Medicaid pregnancy-related benefits. He argues that Douglas is ineligible both under part III and part IV of section 1396a. The Secretary maintains that the cooperation requirement of section 1396k applies to all Medicaid applicants unless otherwise specifically excepted, and applicants covered by part III have not been specifically excepted. While the Secretary acknowledges that applicants covered by part IV have been excepted from the cooperation requirement, he argues that Douglas is not a member of this group. Thus, according to the Secretary, Douglas was ineligible for pregnancy-related Medicaid benefits both before and after the enactment of the 1990 amendment to section 1396k.

## IV.

Medicaid was established in 1965 as a venture in "cooperative federalism," to "provid[e] federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons." *Harris v. McRae*, 448 U.S. 297, 301 (1980). States that choose to participate in Medicaid are subject to the statutory terms of the

program and the regulations promulgated by the Secretary of HHS. 42 U.S.C. § 1396a.

## A.

### Section 1396k

Section 1396k of the Medicaid Act provides several mechanisms by which federal and state governments can recoup some of the costs of medical care provided to low-income persons by pursuing third parties legally obligated to pay these medical costs. Section 1396k contains several interrelated provisions designed "[f]or the purpose of assisting in the collection of medical support payments and other payments for medical care owed to recipients . . . . " 42 U.S.C. § 1396k(a).

First, section 1396k "require[s]" "as a condition of eligibility" that all applicants for Medicaid benefits "assign [to] the State any rights, . . . the individual [or any other person who received benefits for whom the applicant has the authority to execute an assignment] may have "to support . . . and to payment for medical care from any third party." 42 U.S.C. § 1396k(a)(1)(A).

Second, section 1396k requires that an applicant "cooperate with the State . . . in establishing the paternity" of any "person who is eligible for medical assistance," and who is also "a child born out of wedlock. . . . " 42 U.S.C. §§ 1396k(a)(1)(A) and (B). Until its amendment in 1990, the statute excused noncooperation in only one way: a woman would be excused from cooperating in establishing paternity if she was "found to have good cause." 42 U.S.C. §§ 1396k(a)(1)(B)(i) and (ii).

Finally, an applicant is required "to cooperate with the State in identifying, and providing information to assist the State in pursuing, any third party who may be liable to pay for care and services. . . . " 42 U.S.C. § 1396k(a)(1)(C). A "good cause" exception is also available here.

In sum, in order to be eligible for medical assistance, a Medicaid applicant is required to assist the state by assigning any support and medical payment rights to the state, cooperating with the state in establishing the paternity of any minor child born out of wedlock for whom the applicant is legally responsible, and cooperating with the state in identifying and pursuing any third parties who may be liable to pay for medical care. The latter two requirements can be excused if the applicant is found to have "good cause."

MDSS found Douglas noncooperative, without good cause, in establishing the paternity of her oldest child, Ezekio. This determination was upheld on administrative appeal, where Douglas was represented by counsel. Obviously, the question that remains is whether section 1396k's requirements of assignment and cooperation apply to applicants for Medicaid prenatal benefits. Absent an explicit provision to the contrary, there is no reason to think they would not, because as stated above, *all applicants* "for medical assistance" are *"required"* to assign rights, and cooperate in establishing paternity and pursuing third parties.

**B.**

**Sections 1396a(a)(10)(A)(i)(III) and (IV)**

Against the backdrop of the assignment and cooperation section of the Medicaid Act are provisions establishing the eligibility requirements for prenatal care. A determination of such eligibility requires an eye-glazing examination of a labyrinthine maze of sections, and seemingly infinite subsections, of the Medicaid Act.

We begin in section 1396a(a)(10)(A)(i)(*III*) which requires a state plan to make prenatal assistance available for all individuals "who are qualified pregnant women or children as defined in section 1396d(n) of this title. . . ." Section 1396d(n)(1)(C) defines a "qualified pregnant woman" as a pregnant woman who, "otherwise meets the income and resources requirements of a State plan under part A of subchapter IV of this chapter. . . ."

Section 1396a(a)(10)(A)(i)(*IV*) requires prenatal care for all individuals "who are described in subparagraph (A) or (B) of subsection (l)(1) of this section and whose family income does not exceed the minimum income level the State is required to establish under subsection (l)(2)(A) of this section for such a family. . . ."

For purposes of 1396a(a)(10)(A)(i)(*III*), it is undisputed that Douglas meets the income and resources requirements under Michigan's AFDC program, a "State plan." She is ineligible for AFDC only because she failed to cooperate in establishing paternity of Ezekio, as required by 42 U.S.C. § 1396k(a)(1)(B). Indeed, her children presently receive AFDC and her unborn child became eligible for AFDC upon his birth.

Contrary to her assertions, since Douglas is otherwise eligible under section 1396a(a)(10)(A)(i)(*III*)'s income and resources requirements, she is precluded from eligibility under section 1396a(a)(10)(A)(i)(*IV*), because part IV refers the reader to the definition at section 1396a(l)(1)(A) or (B), which in turn excludes anyone described in sections 1396a(a)(10)(A)(i)(I) through (III). Since Douglas is covered by part III, and thus cannot be covered by part IV, she would seem to be under the overriding assignment and cooperation requirements of section 1396k. It is at this point in our analysis that the amendment to section 1396k is relevant.

C.

**The 1990 Amendment to Section 1396k**

Section 1396k was amended in 1990. The relevant text of section 1396k, with the amending language underlined, now reads, in pertinent part:

> [A] State plan for medical assistance shall –
>
> (1) provide that, as a condition of eligibility for medical assistance under the State plan to an individual . . . , the individual is required –
>
> (A) to assign the State any rights, of the individual or of any other person who is eligible for medical assistance under this subchapter and on whose behalf the individual has the legal authority to execute an assignment of such rights, to support (specified as support for the purpose of medical care by a court or administrative order) and

> to payment for medical care from any third party;
>
> (B) to cooperate with the State (i) in establishing the paternity of such person (referred to in subparagraph (A)) if the person is a child born out of wedlock, and (ii) in obtaining support and payments (described in subparagraph (A)) for himself and for such person, unless (in either case) *the individual is described in [42 U.S.C. § ] 1396a(l)(1)(A) of this title or* the individual is found to have good cause for refusing to cooperate as determined by the State agency. . . .

42 U.S.C. § 1396k(a) (emphasis added).

Therefore, the 1990 amendment exempts from the cooperation requirement a specific subset of pregnant women described in 42 U.S.C. § 1396a(l)(1)(A). As mentioned previously, this section describes this group of women as:

> women during pregnancy (and during the 60-day period beginning on the last day of the pregnancy) . . . who are *not* described in any of subclauses (I) through (III) of subsection (a)(10)(A)(i) of this section. . . .

42 U.S.C. § 1396a(l)(1)(A) (emphasis added).

This is the point at which Douglas is made ineligible for Medicaid prenatal benefits. Because she is described in part III, she is not exempt from the assignment and cooperation requirements of section 1396k. There is simply no rational ground for us to conclude, as Douglas would have us, that those otherwise eligible under part

III are somehow exempt from the overriding requirements of assigning rights, cooperating in establishing paternity, and pursuing third parties.

Congress could have made the exception established by the 1990 amendment larger, but – rightly or wrongly – chose not to do so. While Congress has expanded Medicaid pregnancy-related care for low-income women, it has not extended it to persons in Douglas's situation. Douglas, as the district court found, is not covered by the 1990 Amendment's exception to the general cooperation requirement.

D.

**Frustrated Congressional Intent**

Finally, Douglas argues that Congress could not have intended – given its general policy of favoring prenatal assistance to low-income women – that the statutes in question should be read to deny her pregnancy-related Medicaid benefits. As a fall-back position, Douglas contends that even if the statutes, read properly – that is, as they are written – would deny her eligibility, such a reading would frustrate congressional intent, and this court should read the statute so as to allow benefits. Douglas also relies on *Lewis v. Grinker*, 965 F.2d 1206 (2d Cir. 1992), where the Second Circuit gave undocumented aliens pregnancy-related Medicaid benefits in spite of contrary statutory language.

There are several problems with Douglas's contentions. First, it is true that the statutes and relevant legislative history seem to evidence an increasing concern on

the part of Congress for prenatal care for poor women. However, the statutes and relevant legislative history evidence an equally strong congressional commitment to the policy of paternity cooperation as a trade-off for the expenditure of massive public funds for medical care for certain of the nation's poor mothers.

Second, Medicaid's recent emphasis on the pregnant mother, not the unborn child, as the recipient of prenatal care cuts against Douglas's arguments. As the *Lewis* court has noted, recent amendments to the Medicaid statute have worked a "shift from a fetal centered to a maternal centered approach to prenatal care." *Id.* at 1209. This shift necessarily places more emphasis on the mother as the recipient of Medicaid pregnancy-related care. This focus is relevant here because Douglas, not her child, is the person ineligible for Medicaid because of noncooperation. Although the unborn child is one of the intended beneficiaries of Medicaid pregnancy-related care, the threat of losing benefits provides a strong and continuing incentive to the mother to cooperate in establishing paternity for each of her children.

In addition, even if we were to determine – and we do not – that the statutes in question were ambiguous, we would nevertheless conclude that Douglas is subject to the cooperation requirement of section 1396k. When a portion of the Medicaid statutes is ambiguous, we give considerable weight to HHS's interpretation because

> [a]n agency director's interpretation of a statute that his agency is entrusted to administer is entitled to considerable deference and our review of such an interpretation is limited to

> determining whether the administrator's construction of the statute is 'reasonable.'

*Chapman v. United States Dep't of Health & Human Services*, 821 F.2d 523, 527 (10th Cir. 1987). We have also stated that deference to an agency's statutory interpretation is especially important "when an interpretation of a statute involves the reconciliation of conflicting policies." *Wayside Farm, Inc. v. United States Dep't of Health & Human Services*, 863 F.2d 447, 451 (6th Cir. 1988). As the Supreme Court explained in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984):

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

(Footnotes omitted.)

As previously noted, Douglas relies on *Lewis*, 965 F.2d 1206. In *Lewis*, the court held that undocumented

aliens are entitled to pregnancy-related Medicaid benefits, even though, as the court conceded, "the plain language of the statute appears to require denying prenatal care to [these] women. . . . " *Id.* at 1215. *Lewis* did not specifically address whether women covered by section 1396a(a)(10)(A)(i)(III) would be eligible in spite of not cooperating, but did effectively hold that residency eligibility (a requirement similar to cooperation) could be demanded in light of section 1396d(n)'s mention of only income and resource eligibility. Douglas urges this court to adopt the general approach of the *Lewis* court's focus on Congress's unlegislated intent.

We have fundamental concerns with the reasoning in *Lewis v. Grinker*, and its applicability to the case before us. The Second Circuit in *Lewis*, instead of focusing on applying the applicable law as written by Congress, instead sought to determine what it deemed Congress's broader "intent." *Id.* at 1208. We do not believe our proper judicial role is to divine Congress's unlegislated intent, or to make the statutes comport with what we believe Congress's preferred policy to be, or what it ought to be. Rather, this court must apply the law as written, even when a result is produced that we may personally question. The perceived legislative history of the relevant statutes should not be allowed to trump duly enacted laws even if the "unenacted" legislative policy, intent, or history is clear. Here, the legislative history is far from clear. We are not confident that it would even be possible to discover what Congress's "intent" was respecting the very detailed and complex question presented by this appeal. We decline to follow the approach of *Lewis*.

## V.

Douglas's second assignment of error is that the district court wrongly granted summary judgment for the defendants on Douglas's constitutional claim. Douglas argues that the government's policy cannot be related rationally to a legitimate interest because the government itself acknowledges that prenatal care is much less expensive to provide than pediatric care for an ill or low-birth weight baby. She also argues that the statute impermissibly discriminates among poor women who receive government medical assistance. Finally, Douglas argues that in this case, establishing the paternity of Ezekio would not reduce the government's outlay for her unborn child, because Ezekio's father has no financial responsibility for supporting the unborn child. Douglas argues that HHS's interpretation of the paternity cooperation requirement violates the Equal Protection Clauses of the Fifth and Fourteenth Amendments because it creates impermissible classifications among low-income pregnant women.

### A.

Our constitutional review of Congress's " 'decisions to spend money to improve the general public welfare in one way and not another,' " is particularly deferential. *Bowen v. Gilliard*, 483 U.S. 587, 598 (1987) (citations omitted). As the Supreme Court has noted, this deferential standard of review

> is premised on Congress' 'plenary power to define the scope and the duration of the entitlement to . . . benefits, and to increase, to decrease, or to terminate those benefits based on

> its appraisal of the relative importance of the recipients' needs and the resources available to fund the program.'

*Id.* (quoting *Atkins v. Parker*, 472 U.S. 115, 129 (1985)). " 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' " *Id.* at 601 (quoting *McGowan v. Maryland*, 366 U.S. 420, 426 (1961)). In order to survive an equal protection challenge, a statutory scheme that makes classifications based on income, as interpreted by the government, need only "be rationally related to a legitimate governmental interest." *Harris*, 448 U.S. at 326. "[W]e cannot, in the name of the Constitution, overturn duly enacted statutes simply 'because they may be unwise, improvident, or out of harmony with a particular school of thought.' " *Id.* (quoting *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 488 (1955)).

B.

Douglas's policy critiques do not aid her equal protection theory. In spite of Douglas's arguments, the government could rationally conclude that – in the aggregate – requiring low-income pregnant women to cooperate in establishing paternity for children born out of wedlock makes more money available for all Medicaid recipients by making it easier to find putative fathers who should pay medical expenses. Among these Medicaid recipients would be children and "cooperative" pregnant women. While the government's interpretation of the cooperation requirement is not obviously perfect social policy, it is not irrational.

There may be better ways to lower infant mortality among poor women than this statutory scheme provides. However, to fashion such policy from the bench would be to "substitute our personal notions of good public policy for those of Congress. . . . " *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981). HHS's interpretation of the statute does not violate Douglas's equal protection rights.

## VI.

For the foregoing reasons, we **AFFIRM** the district court's grant of summary judgment.

MERRITT, Chief Judge, dissenting. The unwed pregnant plaintiff lost pregnancy medical benefits earmarked for women in poverty because she apparently does not know the identity of the father of her 12-year-old first child and, therefore, is unable to cooperate with the authorities to identify him. This result is not what Congress had in mind when it passed the 1990 Amendment on prenatal medical care for so-called "uncooperating" unwed pregnant mothers.

Unfortunately, Congress has not written its Medicaid prenatal care statute concerning a pregnant woman's duty to identify the father as clearly as it has written its legislative history. The evidence of legislative intent is clear and unmistakable; the statute itself is at best opaque, at worst incomprehensible. The legislative history of the 1990 Amendment clearly states that the statute changes the law in order to allow pregnant women in poverty to be eligible for prenatal medical care even though they cannot (as in this case) or will not identify the father. The House Report says that "under current

law, States must require all applicants for Medicaid, as a condition of eligibility, to cooperate with the State in establishing paternity and in obtaining child support."[1] The Report then says that the legislation changes this rule for pregnant women because "the Committee is concerned that application of these requirements to women who are applying only for pregnancy-related coverage may discourage many of them from seeking benefits that would give them access to early prenatal care." *Id.*

The Report then makes it abundantly clear that it is changing the old rule which denies eligibility for non-cooperating pregnant women:

> The Committee bill, therefore, exempts pregnant women applying for Medicaid on the basis of their pregnancy and low income from the cooperation requirements with respect to establishing paternity and obtaining child support. The provision is effective on enactment.

*Id.* at 2119.

Without this statement of purpose in the legislative history, an accurate analysis of the statute is almost impossible, for the convoluted statutory language is a puzzling jumble of words, exceptions, exceptions to exceptions, and exceptions to exceptions to exceptions, requiring as the Court says, "an eye-glazing examination of a labyrinthine maze of sections, and seemingly infinite

---

[1] H. Rep. No. 101-881, 101st Cong., 2d Sess. 106-07 (1990), *reprinted in* 1990 U.S.S.C.A.N. (104 Stat.) 2017, 2118.

subsections, of the Medicaid Act."[2] Certainly the "plain-meaning" rule has no application here.

My colleagues have analyzed the 1990 Amendment without regard to its above-stated purpose, as though legislative history and evidence of intent have now become irrelevant in complex matters of statutory interpretation. This leads my colleagues into three errors. The first is that they do not state or discuss the above language of the legislative history setting out a clear legislative purpose. Second, this negative approach to legislative history causes them to parse the statutory words contrary to the legislators' stated intent. Third, this approach, as the Court concedes, leads to a conflict with the Second Circuit in *Lewis v. Grinker*, 965 F.2d 1206, 1215-20 (2d Cir. 1992), which addressed the convoluted Medicaid provisions on prenatal care, and held that examination of legislative evidence of intent is more important than the often incomprehensible language of the sub-sections and cross-references of the statute itself.

The 1990 Amendment in effect injected into the middle of a subsection the words "unless (in either case) the individual is described in section 1396a(*l*)(1)(A)" after statutory language that requires an unwed mother

---

[2] Many other Courts have made similar observations about the Medicaid statute, particularly the prenatal provisions. See the cases and quotations on this subject collected in *Lewis v. Grinker*, 965 F.2d 1206, 1216 (2d Cir. 1992)("Within this contorted scheme, few areas are more complex than the coverage of prenatal care").

seeking benefits to help the State establish paternity.[3] The cross-referenced section, § 1396a(*l*)(1)(A), which embodies the amendment simply says: "women during pregnancy (and during the 60-day period beginning on the last day of pregnancy)". If we go this far and no further, there is no problem. The language and meaning of the statute coincide exactly with the expressed intent in the legislative history: Poor but non-cooperating pregnant women are entitled to prenatal pregnancy medical benefits. The problem is that there is a confounding dangling modifier following three sub-subsections later which takes this meaning away. The entire subsection is as follows with the short sub-subsection cross-referenced by the Amendment in capital letters and the confounding dangling modifier in italics:

> (*l*) **Description of group**
>
> **(1)** Individuals described in this paragraph are –

---

[3] Subsection 1396k(a)(1) as amended (with the new part underlined) now requires the beneficiary:

> (B) to cooperate with the State (i) in establishing the paternity of such person (referred to in subparagraph (A)) if the person is a child born out of wedlock, and (ii) in obtaining support and payments (described in subparagraph (A)) for himself and for such person, unless (in either case) *the individual is described in section 1396a(l)(1)(A) of this title or* the individual is found to have good cause for refusing to cooperate as determined by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the individuals involved.

(A) WOMEN DURING PREGNANCY (AND DURING THE 60-DAY PERIOD BEGINNING ON THE LAST DAY OF THE PREGNANCY),

(B) infants under one year of age,

(C) children who have attained one year of age but have not attained 6 years of age, and

(D) children born after September 30, 1983, who have attained 6 years of age but have not attained 19 years of age *who are not described in any of subclauses (I) through (III) of subsection (a)(10)(A)(I) of this section and whose family income does not exceed the income level established by the State under paragraph (2) for a family size equal to the size of the family, including the woman, infant, or child.*

The dangling modifier takes the medical benefits away because, according to my colleagues, the plaintiff is by definition a "pregnant woman" otherwise qualified, "described" in the cross-referenced section 1396a(10)(A)(i)(III). Thus the Court uses the dangling modifier to read the "pregnant woman" exception inserted by the 1990 Amendment out of the law. The only way to make the Amendment consistent with the stated legislative intent is to use only (*I*)(1)(A) in defining pregnant women, not the dangling modifier 44 words later.

The Court also ignores a further problem raised by its circular argument. In holding that the plaintiff is barred from receiving benefits by the dangling modifier, the majority concludes that Congress intended for two classes of women, those described in subparagraphs (III) and (IV) of subsection 1396a(a)(10)(A)(i), to be treated differently: Group III women are denied benefits, and

Group IV women may receive them.[4] But this interpretation of the statutory scheme excludes the most needy non-cooperating women while providing benefits to those with more resources, arguably raising an Equal Protection problem, since no discernible rational purpose has been articulated for such a perverse result.

Because the Court's circular interpretation is not required by the statutory language, does not comport with the expressed legislative intent, and does not avoid Constitutional issues, I dissent.

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[4] Group III individuals are "qualified pregnant women or children as defined in section 1396d(n) of this title." Section 1396d(n), in turn, refers to "a pregnant woman who . . . otherwise meets the *income and resources* requirements of a State plan under aprt [sic] (a) of subchapter IV of this chapter . . . " (emphasis supplied). Group IV individuals are those "who are described in subparagraph (A) or (B) of subsection (*l*)(1) of this section and whose family *income* does not exceed the minimum income level the State is required to establish under subsection (*l*)(2)(A) of this section for such a family. . . . " Thus, Group III women may not exceed either income or resource standards, but Group IV women are required only to meet the income restrictions.

**APPENDIX B**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION – FLINT

REBA DOUGLAS, on behalf of herself and all others similarly situated,

Plaintiff,

v.

LOUIS W. SULLIVAN, M.D., Secretary of Health and Human Services, et al.,

Defendants.
_____/

CIVIL ACTION
NO: 90-CV-40100-FL

MEMORANDUM OPINION AND ORDER

(Filed Dec. 9, 1991)

Before the Court are Cross Motions for Summary Judgment filed by plaintiff and defendant Sullivan. A hearing on this matter was held on November 26, 1991. The dispute is over whether plaintiff was entitled to have her pregnancy-related medical expenses paid by Medicaid, despite her non-cooperation with regard to the paternity of her first child as required for her to receive AFDC payments for her own welfare. On April 16, 1990, the Court granted plaintiff a preliminary injunction, enjoining defendants from interpreting the relevant statutes in such a way as to deny pregnancy-related expenses to pregnant women who have failed to cooperate with regard to the paternity of previously born children but

who have cooperated in establishing the paternity of the child *in utero*. The decision was appealed, and the Sixth Circuit remanded the case for consideration of the issue in light of the 1990 statutory amendments. For the reasons stated below, and those discussed at the hearing, defendant's Motion for Summary Judgment (MSJ) is GRANTED, and plaintiff's Motion is DENIED.

In her brief, plaintiff raises four issues. Plaintiff first argues that she is entitled to receive pregnancy-related medical services under either 42 U.S.C. § 1396a(a)(10)(A)(i) (III) or (IV). Second, plaintiff argues that the cooperation requirement of § 1396k does not apply to persons eligible to receive medical care under § 1396a(a)(10)(A)(i)(I) through (IV). Third, plaintiff argues that the Congressional intent indicates that Medicaid should be provided to those defined in (I) through (IV) above, regardless of cooperation. Fourth and finally, plaintiff argues that defendant Sullivan's interpretation of the cooperation requirement would violate plaintiff's equal protection rights under the Constitution.

I

Plaintiff relies on 42 U.S.C. § 1396a(a)(10)(A)(i) in arguing that she, and similarly situated individuals, are entitled to prenatal, delivery, and postpartum care under Medicaid, despite her ineligibility to otherwise receive AFDC payments for failure to cooperate in establishing the paternity of any previously born child. Plaintiff argues that she is entitled to such welfare payments under 42 U.S.C. § 1396a(a)(10)(A)(i) (III) or (IV). Subclause (III) makes medical assistance available to those

"who are qualified pregnant women or children as defined in section 1396d(n) of this title." Plaintiff claims that she meets the definition of subclause (III) (plaintiff's MSJ at 4). Defendant agrees (defendant's MSJ at 9).[1]

Section 1396d(n), in relevant part, provides:

> The term "qualified pregnant woman or child" means –
>
> (1) a pregnant woman who –
>
> * * *
>
> (C) otherwise meets the income and resources requirements of a State plan under part A of subchapter IV of this chapter.

42 U.S.C. § 1396d(n)(1)(C). There is no dispute that plaintiff meets the income and resources requirements to qualify for AFDC ("a State plan under part A of subchapter IV"). The reason she is not receiving AFDC is for failure to comply with 42 U.S.C. § 1396k. Her first child receives AFDC, but she does not for failure to cooperate in the establishment of paternity. *See* 42 U.S.C. § 1396k(a)(1)(B). Similarly, her second child, regarding whom she did cooperate in establishing paternity, receives AFDC while plaintiff herself does not. The dispute here is whether the failure to cooperate with regard to a previous child should prevent plaintiff from receiving pregnancy care

---

[1] It is noteworthy that, if plaintiff did not qualify for aid under part III, she would qualify under part IV. If she does, as both parties argue, however, qualify under part III, she is precluded from medical care under part IV. This is so because part IV refers one to the definition at section 1396a(l)(1)(A) or (B) which excludes anyone described in section 1396a(a)(10)(A)(i)(I) through (III).

that will affect the welfare of the child *in utero*, who will, eventually, become a ward of the state.

With regard to issue I, the Court finds that plaintiff qualifies under 42 U.S.C. § 1396a(a)(10)(A)(i)(III). Because she is "described" in subclause (III), plaintiff does not qualify under subclause (IV).

II

The second issue raised by plaintif is whether the cooperation requirement of 42 U.S.C. § 1396k applies to persons eligible for pregnancy-related medical care under § 1396a(a)(10)(A)(i) (I) through (IV) ("categorically eligible persons"). Plaintiff argues at pages five through six of her brief that the cooperation requirement does not apply to categorically eligible persons. Specifically, plaintiff argues that, since categorically eligible persons receive Medicaid by virtue of their status in another program, the separate requirements of Medicaid (including, presumably, the cooperation requirement) would not apply (plaintiff's MSJ at 5). Defendant, however, insists that those individuals receiving AFDC or SSI benefits under subsections (I) or (II) *are* subject to the cooperation requirements of § 1396k, as are those who qualify under subsection (III).

Plaintiff's argument might apply with regard to categories (I) and (II), which, according to plaintiff, describe individuals receiving AFDC and SSI benefits respectively. Catefories (III) and (IV), however, do not describe persons otherwise receiving welfare benefits, but rather describes persons by, among other things, income and resource criteria (*see* § 1396d(n)(1)(C), and § 1396a(l)(1)).

Plaintiff attempts to prove her point by stating that cooperation is not a requirement to receive SSI, and that states must automatically provide Medicaid to all SSI recipients (plaintiff's MSJ at 5). That being the case, plaintiff argues, § 1396k does not affect benefits owed to an SSI recipient under § 1396a(a)(10)(A)(i)(II) (plaintiff's MSJ at 5). This argument, however, even if taken as correct, does not logically apply to plaintiff who is not receiving any benefits under any welfare plan. Moreover, if persons qualifying under subclauses (I) through (IV) were categorically not subject to the requirements of § 1396k, then there would be no need for the 1990 amendment to § 1396k(a)(1)(B) excepting those individuals "described in section 1396a(l)(1)(A)" – those qualifying under subclause (IV) of § 1396a(a)(10)(A)(i) and not described in any of subclauses (I) through (III).

Applying § 1396k to plaintiff, the Court finds that the plain (albeit hopelessly confusing) language precludes her from the medical benefits sought. The relevant inquiry is whether § 1396k(a)(1)(B), requiring plaintiff "to cooperate with the State (i) in establishing the paternity of *such person (referred to in subparagraph (A))* if the person is a child born out of wedlock," precludes medical assistance to plaintiff because she failed to cooperate in establishing the pregnancy of a previously born child. Subparagraph (A) refers to "the individual *or of any other person who is eligible for medical assistance under this subchapter.*" Plaintiff's first son is eligible, and in fact receiving, medical assistance under AFDC. Plaintiff failed to cooperate in establishing the paternity of that child. Therefore, subparagraph (B) precludes plaintiff from any assistance under the State plan. Although this is a harsh

result, and, in essence, harms not only plaintiff but also her soon to be born child, this is the correct reading of the statute.

There is (of course) an exception. If plaintiff "is described in section 1396a(l)(1)(A) of this title or [plaintiff] is found to have good cause for refusing to cooperate as determined by the State agency . . . " then the paternity cooperation requirement is excused. 42 U.S.C. § 1396k(a)(1)(B). The State determined that plaintiff failed to cooperate in establishing the paternity of her first child, and this determination was upheld following an administrative hearing (defendant's MSJ at 6, n.1). Plaintiff has not plead that this failure to cooperate was for good cause. Therefore, we must determine whether plaintiff is described in § 1396a(l)(1)(A).

Section 1396a(l)(1)(A) provides in relevant part:

> (1) Individuals described in this paragraph are –
>
> (A) women during pregnancy . . .
>
> * * *
>
> who are not described in any of subclauses I through III of subsection (a)(10)(A)(i) of this section. . . .

Because both parties have argued that plaintiff falls under subclause (III), and because the Court has determined this to be the case, she is not saved by the exception to § 1396k(a)(1)(B). Although plaintiff is not eligible for pregnancy-related medical care because she did not cooperate in establishing the paternity of her first child as required under § 1396k, plaintiff is, nevertheless, *described* in § 1396a(a)(10)(A)(i)(III), which refers to § 1396d(n).

Therefore, following the plain language of the statute, plaintiff is not eligible for the currently sought medical assistance.

III

Plaintiff argues at pages 6 through 10 of her brief that Congressional intent indicates that Medicaid should be provided in this case regardless of cooperation. Plaintiff's argument is predicated upon her being eligible for assistance pursuant to § 1396a(a)(10)(A)(i)(IV) (*see* plaintiff's MSJ at 6-7). As noted in footnote one, however, because plaintiff otherwise is eligible under subclause (III), she is precluded from receiving assistance under subclause IV. If plaintiff did not qualify under subclass III, then she would qualify under IV and, moreover, the cooperation requirement would be excused because she would satisfy the definition of § 1396a(l)(1). This, however, is not the case.

IV

Finally, plaintiff argues that defendant's interpretation of the cooperation requirement's application would violate the equal protection guarantees of the Constitution (plaintiff's MSJ at 10 through 12). Thus, the question is whether the relevant statutory scheme, as interpreted by the government, is rationally related to a legitimate government interest. *Minnesota v. Cloverleaf Creamery Co.*, 449 U.S. 456, 464, 101 S.Ct. 715, 724, 66 L.Ed.2d 659, 668-69 (1981). In this inquiry, the government is

> not required to convince the courts of the correctness of [its] legislative judgments. Rather,

> "those challenging their legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision-maker."

*Id.*, quoting *Vance v. Bradley*, 440 U.S. 93, 111, 99 S.Ct. 939, 59 L.Ed.2d 171 (1979).

It is the Government's position that its application of the cooperation requirements of § 1396k to otherwise eligible women in group III and not to those in group IV is rationally related to its legitimate interest in preserving the fiscal integrity of the Medicaid program (defendant's MSJ at 11). Defendant explains that group III pregnant women, those defined in § 1396d(n), are eligible for Medicaid payments for services unrelated to pregnancy as well as for pregnancy-related services, while group IV pregnant women, as described in § 1396a(l)(1)(A) or (B), only receive Medicaid for pregnancy-related services (defendant's MSJ at 11). In enacting the 1990 amendments, which exempted group IV pregnant women from the cooperation requirement, defendant argues that Congress' decision that the fiscal balance tipped in favor of exempting only those pregnant women who would be eligible only for pregnancy-related Medicaid services is rational (defendant's MSJ at 12). Moreover, defendant insists that the decision to continue to subject to the cooperation requirement those pregnant women who would be otherwise eligible for the full range of Medicaid services is also rational (defendant's MSJ at 12).

Plaintiff, on her part, argues that this scheme is not rational because Congress itself has determined that the provision of prenatal care to poor women results in an

overall savings with respect to welfare expenditures for their children after birth (plaintiff's MSJ at 11). In fact, Congress determined that each dollar provided for prenatal medical care could result in an overall savings of $3.34 in health care costs for low birth weight infants (plaintiff's MSJ at 11). Plaintiff reasons that, since these babies would be born to impoverished women, each child afflicted with mental retardation, cerebral palsy, or other such ailments would likely become a ward of the state for life. Indeed, the legislative history of the 1990 amendments indicated the House Energy and Commerce Committee's concern for the lack of prenatal care for poor pregnant women:

> Under current law, states must require all applicants for Medicaid, as a condition of eligibility, to cooperate with the State in establishing paternity and in obtaining child support. The State may waive this requirement if it determines that the individual has good cause for refusing to cooperate.
>
> The Committee is concerned that application of these requirements to women who are applying only for pregnancy-related coverage may discourage many of them from seeking benefits that would give them access to early prenatal care. . . .
>
> Thus, the cooperation requirement is not only a potential barrier to prenatal care for the high-risk, low-income women that would most benefit from it, but it is also a bureaucratic hurdle that yields absolutely no useful information until months after the prenatal period has ended. The Committee bill therefore exempts pregnant women applying for Medicaid on the

> basis of their pregnancy and low income from the cooperation requirements with respect to establishing paternity and obtaining child support. . . .

H. Rep. 881, 101st Cong. 106-07, *reprinted in* 1990 U.S. Code Cong. & Admin. News 2017, 2118-19. Therefore, concludes plaintiff, the governmental interest involved cannot be economic, and it is not rational to exempt group IV women from the cooperation requirement and not those in group III (who are poorer than those in group IV).

However imprudent it may be, the Court finds the statutory scheme as interpreted by the Government to be within the bounds of rationality. While it may result in higher costs of child care after birth, as plaintiff argues, by the 1990 amendments Congress seems to have decided that to encourage women situated as is plaintiff to establish paternity of all children will, in the aggregate, produce a more fiscally sound Medicaid program. By requiring women to cooperate in establishing the paternity of all children born to them will arguably result in the Government having more resources from which to draw for the provision of welfare to those children qualifying for AFDC benefits.

Despite the foregoing, it is troubling to the Court that, while out of Congress' mouth comes words indicating the intent to encourage poor women to apply for pregnancy-related benefits, by the pen Congress amends § 1396k in a manner that denies benefits to many of these same poor women merely because they are otherwise eligible for full Medicaid benefits. The statutory scheme provides an all-or-nothing Medicaid package for group

III women, dependent upon their cooperation in establishing paternity of all previously born children, while group IV women have no cooperation requirement because they are eligible only for pregnancy-related services. Nevertheless, while the Court finds that an additional provision providing plaintiff and all similarly situated women the option of applying for only pregnancy-related services would be more effective in attaining Congress' overall goal of fiscal integrity and lowering the rate of infant mortality and morbidity, the Court does not find the statutory scheme to be unconstitutional. As defendant notes:

> Even if the policies underlying § 1396k are somewhat in tension with Congress' objective in expanding Medicaid coverage of pregnant women, the responsibility for balancing those objectives is with Congress (as it seems to have done in enacting the 1990 amendment) and the Secretary (in interpreting the statute) rather than plaintiff or this Court.

(defendant's MSJ at 13). Therefore, however imprudent and unwise, the Court must uphold the statutory scheme as it is rationally related to the Government's stated legitimate interest.

Disposition

For the foregoing reasons, defendant's Motion is hereby GRANTED, plaintiff's Motion is DENIED, and Summary Judgment is ENTERED in favor of defendants.

SO ORDERED.

Date: 12/9/91

/s/ Stewart A. Newblatt 12/9/91
STEWART A. NEWBLATT
United States District Judge

## APPENDIX C

CATEGORICALLY ELIGIBLE

| 1396a(a)(10)(A)i | I | II | III | IV |
|---|---|---|---|---|
| Status | ADC | SSI | Pregnant Woman 1396 d (n) | Pregnant Woman 1396 a (l) |
| Income | ADC Level | SSI Level | ADC Level | <185% Poverty |
| Assets | ADC Level | SSI Level | ADC Level | No Limit |

## APPENDIX D

Office of the Assistant Secretary
for Legislation

DEPARTMENT OF HEALTH & HUMAN SERVICES

---

Washington, D.C. 20201

July 16, 1991

NOTE TO: Shannon Salmon
Marina Weiss
Karen Nelson
Mary McGrane

RE: Medicaid Technical Amendments

Attached for your consideration are various draft technical Medicaid amendments. Don Johnson in HCFA's Office of Legislation and Policy is the contact person. His number is 245-2864.

/s/ Toni
Toni Davenport
Deputy Director
Office of Health Legislation

Attachment

---

### OBRA-90 TECHNICALS

**Section 4602 – Mandatory Use of Outreach Locations Other Than Welfare Offices.**

*Proposed Change:* Simplified eligibility determination for low-income pregnant women

Amend section 1902(l)(1) of the Social Security Act, in the matter after and below subparagraph (D), by striking "who are not described in any of the subclauses (I) through (III) of subsection (a)(10)(A)(i) and".

*Description:* Section 4602 of OBRA '90 requires States to provide for the receipt and initial processing of applications of individuals applying for poverty-related eligibility for medical assistance using applications other than those used for aid under AFDC or SSI. Because of the special provisions related to these groups, the application referenced in section 4602 need not address resources if the State has chosen not to apply a resource test for poverty-related eligibility and need not address incurred medical expenses.

As long as the phrase "who are not described in . . . " remains in the statute, a woman cannot be determined to be a low income pregnant woman until it is determined that she is *not* a "qualified pregnant woman" (who is technically entitled to more services). The same is true for pregnant women and children who must first be determined *not* to be eligible for AFDC. States therefore must first determine the resources of all pregnant applicants to determine if they fit the more restrictive eligibility categories before they can determine eligibility under 1902(l).

If this phrase is stricken, simplified application forms could be used, as Congress intended, for any pregnant woman (or child born after September 30, 1983) who was applying under the poverty related criteria. Though the poverty related groups are not entitled to all Medicaid services but only pregnancy and postpartum related ones,

this change would not prevent pregnant women and children from applying for eligibility through AFDC or as a "qualified pregnant woman" in order to (potentially) receive more services.

*Effective Date:* As if included in OBRA-90.

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No. 92-1990

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1992

REBA DOUGLAS, for herself and
all others similarly situated,

Petitioner,

v.

C. PATRICK BABCOCK, Director of the
Michigan Department of Social Services,
and LOUIS SULLIVAN, Secretary of Health
and Human Services,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

# BRIEF OF RESPONDENT BABCOCK IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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## STATEMENT OF THE CASE

The following is intended to supplement and/or correct certain statements in Appellant's Petition for Writ of Certiorari.

Petitioner Douglas' Medicaid benefits were terminated in 1985 following an administrative hearing at which it was determined that Petitioner failed to cooperate in establishing the paternity of one of her children. The facts establishing Petitioner's noncooperation are set forth in the Michigan Department of Social Services' (MDSS) May 5, 1985 Administrative Hearing Decision. R.42[1]

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[1]In the Petition, pp 12-13, Petitioner's recitation of the facts surrounding the determination of her failure to cooperate is in part incomplete and in part not supported by the Administrative Hearing Decision, which is the only reference to such facts on the record below. However, these facts are not material to the legal issues presented by Petitioner's Petition for Writ of Certiorari.

Thereafter, Petitioner became pregnant and informally again requested Medicaid benefits (no application was filed). R.13, p 4. As reflected in the Answer and Cross-Claim of Respondent Babcock (R.13), it has been the State Respondent's position from the outset of this litigation that the State "was willing to provide pregnancy-related Medicaid benefits to Plaintiff, but for [Respondent] Sullivan's agency's directive to MDSS that such payments are, in the interpretation of the federal agency, prohibited under Title XIX of the Social Security Act, 42 U.S.C. 1396 et seq." R.13, p 4. See also Court of Appeals Decision, n. 1. Until February 1, 1987, MDSS did provide Medicaid coverage for otherwise eligible pregnant women, even where they had failed to cooperate with

MDSS in establishing paternity or obtaining medical support for another child in the home. R. 13, p 7. The State Respondent informed the District Court that "but for Cross-Defendant Sullivan's interpretation of Title XIX of the Social Security Act, MDSS would be providing Medicaid benefits to such pregnant women who are otherwise eligible for Medicaid benefits under 42 U.S.C. 1396 et seq." R.13, p 7.

## ARGUMENT

### THE STATE OF MICHIGAN WOULD PROVIDE MEDICAID COVERAGE TO OTHERWISE ELIGIBLE NONCOOPERATING PREGNANT WOMEN IF IT WERE PERMITTED TO DO SO BY THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES.

Pursuant to 42 U.S.C. 1396, the U.S. Department of Health and Human Services (HHS) makes payments to states partici-

pating in the Medicaid program in accordance with a "state plan for medical assistance" which must be approved by the Secretary of HHS. 42 U.S.C. 1396k sets forth certain provisions which must be included in the state plan relating to a Medicaid recipient or applicant's obligation to cooperate in establishing the paternity and obtaining medical support from the father of any child born out of wedlock who is eligible for medical services. 42 U.S.C. 1396a(l) creates Medicaid eligibility for certain pregnant women who would not otherwise be eligible for Medicaid benefits. The State of Michigan has made it clear that it would pay benefits to pregnant women similarly situated to Petitioner Douglas but for the federal Respondent's interpretation of the Social Security Act as prohibiting

eligibility for pregnant women who would be eligible for Medicaid under other provisions of the Social Security Act, but for their refusal to cooperate with the State in establishing the paternity of their Medicaid-eligible children.

## CONCLUSION

The State Respondent does not oppose the Petition for Writ of Certiorari.

Respectfully submitted,

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No. 92-1990

# In the Supreme Court of the United States

OCTOBER TERM, 1993

REBA DOUGLAS, ETC., PETITIONER

*v.*

GERALD H. MILLER, DIRECTOR, MICHIGAN DEPARTMENT OF SOCIAL SERVICES, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE SECRETARY OF HEALTH AND HUMAN SERVICES IN OPPOSITION

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13 pp

## QUESTIONS PRESENTED

1. Whether the Secretary of Health and Human Services reasonably interpreted 42 U.S.C. 1396k(a) to render petitioner ineligible for Medicaid benefits because she has not cooperated in establishing the paternity of one of her minor children born out of wedlock.

2. Whether the denial of Medicaid benefits to petitioner violates the equal protection component of the Due Process Clause of the Fifth Amendment.

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## BRIEF FOR THE SECRETARY OF HEALTH AND HUMAN SERVICES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-22) is reported at 990 F.2d 875. The opinion of the district court (Pet. App. 23-34) is reported at 792 F. Supp. 1030.

### JURISDICTION

The judgment of the court of appeals was entered on March 25, 1993. The petition for a writ of certiorari was filed on June 16, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Petitioner had two minor children and was pregnant with a third child when she applied for Medicaid benefits in 1989. Pet. App. 2. As "a condition of eligibility for medical assistance," the Medicaid Act "require[s]" that an applicant "assign [to] the State any rights" she may have "to support * * * and to payment for medical care from any third party." 42 U.S.C. 1396k(a)(1)(A). An applicant must also "cooperate * * * in establishing the paternity of * * * a child born out of wedlock." 42 U.S.C. 1396k(a)(1)(B). At the time petitioner sought benefits, an applicant could be excused from the cooperation requirement only if she were found to have "good cause" for failing to cooperate. *Ibid.* The Michigan Department of Social Services (MDSS) denied petitioner's application for Medicaid benefits because she had failed to cooperate without good cause in establishing the paternity of her oldest child, Ezikio, and in assigning rights for his support. Pet. App. 2.

Petitioner filed suit in district court against MDSS and the Secretary of Health and Human Services (HHS), challenging the denial of Medicaid benefits. The district court granted a preliminary injunction barring HHS and MDSS from "interpreting the assignment and cooperation requirements of the Medicaid statute to bar prenatal * * * care of pregnant women who have complied with the requirements with respect to the child *in utero*." Pet. App. 3.* The Secretary appealed the preliminary injunction. While the appeal was pending, Congress amended 42 U.S.C. 1396k(a)(1)(B) to exempt certain pregnant women—those "described in [42 U.S.C.1396a(*l*)(1)(A)]"—from the cooperation require-

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* Despite the broad form of the preliminary injunction, the district court never certified a class.

ment. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 4606(a), 104 Stat. 1388-170 (codified at 42 U.S.C. 1396k(a)(1)(B) (Supp. III 1991)). After oral argument, the court of appeals remanded the case to allow the district court to consider the effect of the 1990 amendment. Pet. App. 3.

On remand, the district court held that, "following the plain language of the statute," Pet. App. 29, petitioner was ineligible for Medicaid because she had failed to cooperate in establishing the paternity of Ezikio. The court concluded that petitioner was not within the group exempted from the cooperation requirement by the 1990 amendment. *Id.* at 28. The court also denied petitioner's claim that the denial of benefits violated her right to equal protection. The court reasoned that the Act encourages Medicaid applicants to help establish paternity, and thus is rationally related to the legitimate governmental interest in promoting "a more fiscally sound Medicaid program" by making more resources available to poor children. *Id.* at 32.

A divided panel of the court of appeals affirmed. The court first reviewed the statutory language, concluding that "*all applicants* 'for medical assistance' are '*required*' to assign rights, and cooperate in establishing paternity and pursuing third parties." Pet. App. 7 (emphasis supplied by court). The court then interpreted the 1990 amendment to "exempt[ ] from the cooperation requirement a specific subset of pregnant women described in [42 U.S.C. 1396a(*l*)(1)(A)]." Pet. App. 10. The court explained that Section 1396a(*l*)(1)(A) in turn includes only those women "who are *not* described in any of subclauses (I) through (III) of [42 U.S.C. 1396a(a)(10)(A)(i)]." Pet. App. 10 (emphasis added by court). Because petitioner "is described in [subclause] III," the court concluded that she "is not covered by the 1990

Amendment's exception to the general cooperation requirement." *Id.* at 10, 11.

The court of appeals rejected petitioner's contention that the plain language of the statute should be overridden by "Congress's unlegislated intent," observing that the "perceived legislative history of the relevant statutes should not be allowed to trump duly enacted laws." Pet. App. 14. Moreover, the court noted that even if it thought the statute ambiguous, it would still defer to the Secretary's interpretation, and particularly so in light of the conflicting policies involved. *Id.* at 12-13.

Finally, the court held that the relevant statutory provisions did not violate petitioner's right to equal protection, because "the government could rationally conclude that * * * requiring low-income pregnant women to cooperate in establishing paternity for children born out of wedlock makes more money available for all Medicaid recipients by making it easier to find putative fathers who should pay medical expenses." Pet. App. 16.

Chief Judge Merritt dissented. Pet. App. 17-22. He was of the view that the legislative history of the 1990 amendment expressed "a clear legislative purpose" to exempt all pregnant women from the cooperation requirement, *id.* at 19, and he believed that the majority should have ignored the "dangling modifier" in Section 1396a(*l*)(1)(A) that restricts that provision to individuals "not described in any of subclauses (I) through (III)." *id.* at 21.

## ARGUMENT

Review by this Court is not warranted. The court of appeals correctly interpreted the statutory provisions at issue, and its decision creates no conflict among the courts of appeals.

1. a. The Secretary's interpretation of the Medicaid Act represents a reasonable construction of the statu-

tory language involved. The Act "require[s]," as "a condition of eligibility for medical assistance," that an applicant "cooperate * * * in establishing the paternity of * * * a child born out of wedlock." 42 U.S.C. 1396k(a)(1)(B). The 1990 amendment did not eliminate the cooperation requirement, but merely exempted a specific subgroup of pregnant women—those "described in [42 U.S.C. 1396a(*l*)(1)(A)]." 42 U.S.C. 1396k(a)(1)(B) (Supp. III 1991). Section 1396a(*l*)(1)(A) in turn refers to "women during pregnancy * * * who are *not* described in any of subclauses (I) through (III) of [42 U.S.C. 1396a(a)(10)(A)(i)]." (emphasis added). In other words, those women described in subclauses I through III are not covered by the amendment, and are therefore not exempt from the cooperation requirement. Only those women described in subclause IV are exempt.

Petitioner is described in subclause III, the subclause covering pregnant women who meet certain eligibility requirements of the Aid to Families with Dependent Children (AFDC) program—including those, such as petitioner, who are not eligible for AFDC but "otherwise meet[ ] [AFDC's] income and resources requirements." 42 U.S.C. 1396d(n); see 42 U.S.C. 1396a(a)(10)(A)(i)(III). By its terms, Section 1396a(*l*)(1)(A) excludes any women covered by subclause III. Since the 1990 amendment exempts only those applicants included in Section 1396a(*l*)(1)(A), petitioner is required to cooperate in establishing paternity as a condition of obtaining Medicaid benefits.

b. The legislative history of the 1990 amendment does not compel a contrary conclusion. Although the provisions of the Medicaid Act at issue in this case require careful parsing, they are not ambiguous. In any event, the legislative history is not at odds with the Secretary's interpretation. The House Report noted the committee's concern about the "application of [the coop-

eration and assignment] requirements to women who are applying *only* for pregnancy-related coverage." H. R. Rep. No. 881, 101st Cong., 2d Sess. 106 (1990) (emphasis added). That passage refers exclusively to women in Group IV, who are eligible only for pregnancy-related benefits. The report language does not encompass Medicaid applicants in Groups I, II, and III, all of whom must be provided with the full range of Medicaid care and services and are not restricted to pregnancy-related coverage. See 42 U.S.C. 1396a(a)(10)(A). The committee report went on to state that the amendment exempted "pregnant women applying for Medicaid *on the basis of their pregnancy and low income*." H.R. Rep. No. 881, *supra*, at 107 (emphasis added). That description similarly applies only to Group IV women, whose eligibility is based on pregnancy and low income. It does not apply to members of Groups I, II, or III, whose eligibility for Medicaid is based on meeting certain eligibility requirements of other government programs.

c. Had Congress wished to exempt all pregnant women from the cooperation requirement, it could easily have done so. Instead, Congress chose to amend the Act to exclude only particular groups of pregnant women, which do not include petitioner. There is simply no basis in the statutory language or legislative history for petitioner's assertion that Congress "established a new mandatory categorically eligible group" comprised of persons who need not comply with any of the other requirements of the Medicaid Act. See Pet. 14.

2. a. Petitioner makes two arguments based on statutory language. First, petitioner contends that the court of appeals erred in considering language in Section 1396a(*l*)(1)(A) limiting the provision to women "who are not described in any of subclauses (I) through (III) of [42 U.S.C. 1396a(a)(10)(A)(i)]." Petitioner characterizes this limiting language as a "dangling phrase" which should

be ignored. See Pet. 18. However, the Secretary's interpretation, which takes account of all of the statutory language is, at a minimum, reasonable. Significantly, petitioner's contrary interpretation would have the effect of also reading the income limitations out of this Section of the Act, since they are contained in the same "dangling phrase."

Second, petitioner relies on 42 U.S.C. 1396a(a)(10)(A)(i), which requires a state plan to "provide * * * for making medical assistance available" to defined groups of people, including "qualified pregnant women." 42 U.S.C. 1396a(a)(10)(A)(i)(III). Contrary to petitioner's suggestion, this Section requires only that medical assistance be "available" under a state plan. It cannot be read to require that such assistance be provided regardless of whether applicants comply with other Medicaid eligibility requirements.

b. Petitioner also suggests that "Congress' belief in the need for prenatal care for all poor women is evident from a review of" the legislative history of the 1990 amendment and other statutory provisions concerning prenatal care. Pet. 21; see Pet. 20-25. But as the court of appeals correctly observed, while Congress has expressed concern about prenatal care, "the statutes and relevant legislative history evidence an equally strong congressional commitment to the policy of paternity cooperation as a trade-off for the expenditure of massive public funds for medical care for certain of the nation's poor mothers." Pet. App. 12.

c. Contrary to petitioner's contention, Pet. 25-26, the Secretary's interpretation is entitled to particularly great deference, in light of the complexity of the statutory scheme at issue. See *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 43-44 (1981). Nor does the internal memorandum cited by petitioner (see Pet. 25; Pet. App. 36-38) diminish the deference to be accorded to the Secretary's

interpretation. Indeed, the memorandum does not even concern the cooperation requirement. The memorandum urges that the phrase "who are not described in any of subclauses (I) through (III) of [42 U.S.C. 1396a(a)(10)(A)(i)]" be deleted from 42 U.S.C. 1396a(*l*)(1) in order to facilitate application procedures. See Pet. App. 37. The language relied on by petitioner, "as Congress intended," refers to the simplification of application procedures, not to the waiver of the requirement of cooperation in establishing paternity. *Ibid.*

3. The holding below does not conflict with *Lewis* v. *Grinker*, 965 F.2d 1206 (2d Cir. 1992). In *Lewis*, the Second Circuit construed the citizenship requirements of the Medicaid Act and held that illegal aliens are entitled to pregnancy-related Medicaid benefits notwithstanding statutory language limiting coverage of such aliens to emergency situations. In the instant case, the Sixth Circuit interpreted the wholly unrelated Medicaid requirement that applicants cooperate in establishing paternity of their children born out of wedlock. The "single narrow question," *id.* at 1208, decided by the *Lewis* court did not implicate the cooperation requirement. Because the two decisions interpret two entirely distinct statutory provisions, they do not conflict.

To be sure, the Sixth Circuit did eschew "the general approach of the *Lewis* court's focus on Congress's unlegislated intent," and instead construed "the applicable law as written by Congress." Pet. App. 14. However, this philosophical disagreement about the "proper judicial role," *ibid.*, and the relative weight to be given to legislative history in statutory interpretation, is not the kind of conflict that merits this Court's attention.

4. Petitioner argues (Pet. 26-28) that the requirement of cooperation in establishing paternity is irrational and therefore violates her right to equal protection. But as the court of appeals correctly noted, "the government

could rationally conclude that * * * requiring low-income pregnant women to cooperate in establishing paternity for children born out of wedlock makes more money available for all Medicaid recipients by making it easier to find putative fathers who should pay medical expenses." Pet. App. 16. Moreover, Congress's decision to excuse only one group of pregnant women from the statutory requirement is a sensible one, because the exempted group is eligible only for pregnancy-related services, not for payments for other medical care, and therefore is the group likely to pose the least potential cost to the government.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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